DOCKET

PROCEEDINGS AND ORDERS DATE: 111984

CASE NBR 83-1-01971 CSY
SHORT TITLE Illinois
VERSUS Washington, Charles

DOCKETED: May 29 1984

Date	Proceedings and Orders
May 29 1984	Petition for writ of certiorari filed.
Jun 14 1984	Waiver of right of respondent Charles Washington to respond filed.
Jun 20 1984	DISTRIBUTED. September 24, 1984
Sep 11 1984	Response requested.
Oct 12 1984	Brief of respondent Charles Washington in opposition filed.
Oct 17 1984	REDISTRIBUTED. November 2, 1984
Nov 5 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	Petition DENIED. Dissenting opinion by Justice White, with whom The Chief Justice and Justice Rehnquist join. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

Office - Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS,
CLERK

83-1971

No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

CHARLES WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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MAY 29, 1984

The Scheffer Press, Inc.—(312) 263-6850

35pp

QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court has erroneously determined that the Sixth Amendment requires that the respondent merely show a possible attorney conflict of interest in a non-multiple representation situation to gain a *per se* reversal of his murder conviction.

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PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

CHARLES WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, People of the State of Illinois, respectfully prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of Illinois.

OPINION BELOW

The Supreme Court of Illinois issued its opinion in this case on January 20, 1984, and it is reported at 101 Ill. 2d 104, 461 N.E.2d 393, 77 Ill. Dec. 770 (1984). The court in its opinion declined to apply the two part, actual conflict/adverse performance, rule that was enunciated by this Court in *Cuyler* v. *Sullivan,* 446 U.S. 335 (1980), because the Illinois court believed that *Cuyler*

applied only to conflicts arising out of multiple representation of co-defendants. The court continued to adhere to its interpretation of the Sixth Amendment for non-multiple representation conflicts, guided by the language of this Court in *Glasser* v. *United States,* 315 U.S. 60 (1942), and applied a *per se* rule which provides that prejudice is presumed and reversal is mandated upon a defendant's showing that his attorney had a possible conflict of professional interests.

The Appellate Court, First District, Third Division, had previously reversed respondent's murder conviction on the conflict of interest issue in an opinion reported at 111 Ill. App. 3d 711, 444 N.E.2d 753, 67 Ill. Dec. 517 (1st Dist., 1982). Copies of the opinions of the Illinois Supreme Court and the Appellate Court are appended to this petition.

JURISDICTION

The opinion of the Illinois Supreme Court affirming the order of the Appellate Court was rendered on January 20, 1984. The order of the Illinois Supreme Court denying the People's petition for rehearing was filed on March 30, 1984. The instant Petition for Writ of Certiorari is filed within 60 days of that denial. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

At approximately 7:00 a.m. on May 7, 1979, respondent Charles Washington, a resident of Chicago Heights, Illinois, went to the trucking garage at the Canfield Beverage Company in Chicago, Illinois, and shot to death his estranged brother-in-law, Nathan Bottley. The Chicago police, upon learning from a cousin of the deceased that the respondent had previously threatened Bottley, contacted the Chicago Heights police. A Chicago Heights detective then re-interviewed witnesses to the November, 1977, murder of Albert Johnson in Chicago Heights, a murder in which the respondent was once implicated but never charged. On May 16, 1979, on the basis of information gained from the re-interviews, the Chicago Heights police, while accompanied by two Chicago police officers, arrested the respondent for the Johnson murder.

Respondent was arrested about 2:00 p.m. and a preliminary hearing on the Chicago Heights murder charge was held approximately 48 hours later on May 18, 1979. In the interim, respondent was first questioned at the Chicago Heights police station about the Johnson and Bottley murders. Following approval of the Chicago Heights murder charge against the respondent by an assistant Cook County State's Attorney, respondent was transported to Chicago police headquarters in the early morning hours of May 17 for a lineup. Two eyewitnesses identified the respondent as the man who shot Bottley. Respondent was returned to the Chicago Heights police station later in the morning of May 17. The Cook County grand jury subsequently indicted the respondent for the murder of Nathan Bottley.

Respondent filed pre-trial motions to quash arrest and suppress identification, contending that the Chicago police did not have probable cause to arrest him in Chicago Heights. A consolidated pre-trial hearing was held on the motions. Respondent was represented at the hearing and at trial by an attorney who held a part-time position as the attorney for the Village of Chicago Heights. During the hearing, the assistant State's Attorney brought the fact of defense counsel's other employment to the attention of the trial court, and the following colloquy ensued in the respondent's presence:

> ASSISTANT STATE'S ATTORNEY: Judge, also I would like to put something in the record right now. I have discussed it with counsel before.
>
> I would like the Court to be aware of, and let the record be perfectly clear that Mr. Helsel, who represents the defendant in this matter, is the City Attorney for the City of Chicago Heights.
>
> THE COURT: I know that.
>
> ASSISTANT STATE'S ATTORNEY: I want it on the record, to make sure there was no conflict in the future, and that this matter of course, of the allegation that it happened in the City of Chicago, and not in Chicago Heights. I want the record to be clear that he is the prosecutor for the City of Chicago Heights.
>
> DEFENSE ATTORNEY: Judge, if Counsel would like it a matter of record, I can go one step further. I made my client aware of this situation before I even undertook to represent him in this matter. The point came up after I had been retained to represent him. At that point in time, I interviewed him and advised him that I could no longer represent him on the Chicago Heights matter. I indicated if he desired for me to continue to represent him on the Chicago matter, that I anticipated no Chicago Heights Police Officers to be called. I feel I could, which he indicated he had no objection. Since that, I have withdrawn from the Chicago Heights matter.
>
> ASSISTANT STATE'S ATTORNEY: Fine, Judge, so it is perfectly clear.
>
> THE COURT: Mr. Washington, you have no objection to Counsel representing you in this matter?
>
> THE DEFENDANT: No, Judge.

Later in the hearing, petitioner called a Chicago Heights police officer as a prosecution witness to testify about the May 16th arrest of the respondent. Defense counsel cross-examined the witness. Then defense counsel called a different Chicago Heights police officer as a rebuttal witness. Defense counsel vigorously argued that the Chicago Heights police engaged in a sham and subterfuge with the Chicago police to manufacture probable cause for respondent's arrest.

The trial court, however, found that the Chicago Heights police had probable cause to arrest the respondent for the Johnson murder and that the lineup held in Chicago was permissible because the respondent remained in the custody of the Chicago Heights police until a warrant was issued for the Bottley murder. The trial court denied respondent's motions.

Respondent was tried by a jury. James Moore, an employee of Canfield Beverage Company, testified that he was working on a truck engine in the garage on the morning of the murder. He heard shots, looked around, and saw from a distance of about 12 feet a man shooting his co-worker, the deceased, Nathan Bottley. Another witness, Marla Gransberry, testified that she saw a Canfield employee chased into the garage by a man with a gun. She heard three shots and saw the man

with the gun run out of the garage. She also made a positive in-court identification of the respondent.

The jury found the respondent guilty of murder and armed violence. After a pre-sentence investigation and a full hearing in aggravation and mitigation, defendant received a 28 year sentence for murder.

On appeal, the Illinois Appellate Court found a *per se* conflict of interest and insufficient waiver of the conflict. It reversed respondent's murder conviction and remanded the case for a new pre-trial hearing and further prosecution.

Before the Illinois Supreme Court, the petitioner maintained that the development of the *per se* rule in Illinois was an historical anomaly, and that because of this Court's holding in *Cuyler* the *per se* rule, which requires reversal where there is a possible conflict of interest in non-multiple representation situations, was an incorrect interpretation of the Sixth Amendment and *Cuyer*. The People also argued that if there was any conflict it was waived on the record by respondent at a very early stage of the pre-trial proceedings.

The Illinois Supreme Court held that the *Cuyler* rule was intended to apply only in a multiple representation context. The court held that the Sixth Amendment requires reversal where a criminal defendant merely shows a possible attorney conflict of interest.

In their petition for rehearing, the petitioner urged the court to reconsider its construction of *Cuyler* in light of the action of this Court in *Wood* v. *Georgia,* 450 U.S. 261 (1981), *Massachusetts* v. *Hurley,* 449 U.S. 809 (1980) (per curiam), and *Brown* v. *United States,* 446 U.S.

961 (1980) (per curiam). In these three non-multiple representation conflict of interest cases, this Court directed the application of *Cuyler* by the lower courts on remand. Furthermore, petitioner noted that the federal circuit courts have applied the *Cuyler* rule in non-multiple representation contexts: *O'Guin* v. *Foltz,* 715 F-2d 397 (6th Cir. 1983); *Ware* v. *King,* 694 F.2d 89 (5th Cir. 1982); *United States* v. *Hearst,* 638 F.2d 1190 (9th Cir. 1980). Finally, petitioner argued that it is analytically inconsistent to generally describe a possible conflict as a *per se* violation of the Sixth Amendment while simultaneously maintaining that a possible conflict in multiple representation is not *per se* violative merely because the court deems the possibility inherent in multiple representation. Nevertheless, the court denied rehearing on March 30, 1984.

REASON FOR GRANTING THE WRIT

THE ILLINOIS SUPREME COURT HAS ERRONEOUSLY DETERMINED THAT THE SIXTH AMENDMENT REQUIRES THAT THE RESPONDENT MERELY SHOW A POSSIBLE ATTORNEY CONFLICT OF INTEREST IN A NON-MULTIPLE REPPRESENTATION SITUATION TO GAIN A *PER SE* REVERSAL OF HIS MURDER CONVICTION.

In reversing respondent's murder conviction, the Illinois Supreme Court interpreted the Sixth Amendment to require that a defendant need only show a possible attorney conflict of interest in order to establish a violation of his right to effective assistance of counsel where the claimed conflict does not involve multiple representation. Though this "*per se*" rule was expressly rejected by the United States Supreme Court in *Cuyler* v. *Sullivan,* 446 U.S. (1980), the court below made an unwarranted distinction between multiple and non-multiple representation conflicts and restricted *Cuyler's* application to the former. The holding of the Illinois Supreme Court to which the writ of *certiorari* herein is sought is not only devoid of support in federal constitutional caselaw but is also contrary to the federal caselaw applying *Cuyler.*

Although this Court has not affirmatively stated that there is no distinction between types of attorney conflicts of interest for Sixth Amendment purposes, it has directed the lower courts to review non-multiple representation conflict of interest cases under the *Cuyler* standard: *Wood* v. *Georgia,* 450 U.S. 261 (1981); *Massachusetts* v. *Hurley,* 449 U.S. 809 (1980) (per curiam); *Brown* v. *United States,* 446 U.S. 961 (1980) (per curiam). Most recently this Court in *Strickland* v. *Washington,* No. 82-1554, 52 U.S.L.W. 4565 (May 14, 1984) described the two part

standard of review enunciated in *Cuyler* as the controlling analysis for judging the merits of conflict of interest claims,

> [I]t is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, *the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above* [actual or constructive denial of the assistance of counsel altogether due to the actions of the government or its agents]. *Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and "that an actual conflict of interest adversely affected his lawyer's performance."* *Cuyler* v. *Sullivan, supra,* at 350, 348 (footnote omitted). *Strickland* v. *Washington,* No. 82-1554, 52 U.S. L.W. 4565, 4571-72 (May 14, 1984) (emphasis added).

To the present day, the *per se* non-multiple representation rule in Illinois remains exclusively a promulgation of the Sixth Amendment right to counsel of the United States Constitution. No Illinois Court has relied on the Illinois Constitution in applying the rule. In the case at bar, the court below reiterated the basis and nature of the *per se* rule:

> An accused's sixth amendment right to effective assistance of counsel is a fundamental right. (citations omitted) The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations. (citations omitted) In order to assure and protect these rights, the defendant need not show prejudice in order to justify a reversal of his conviction if the attorney representing him has an actual or possible

conflict of professional interests. (citations omitted) *People* v. *Washington,* 101 Ill. 2d 104, 108-09, 461 N.E.2d 393 (1984).

In the case below there was no indication whatsoever that counsel's performance was in any way hindered by any conflict at all. Moreover, defendant even waived any possible conflict on the record at the pre-trial motions before the murder trial commenced. *Holloway* v. *Arkansas,* 436 U.S. 475, 484 (1978).

The rule that the Illinois Supreme Court persists in applying, notwithstanding *Cuyler,* was first announced in *People* v. *Stoval,* 40 Ill. 2d 109, 239 N.E.2d 441 (1968), and referred to as a *"per se"* rule in *People* v. *Coslet,* 67 Ill. 2d 127, 364 N.E.2d 67 (1977). In *Stoval,* the defendant was charged with burglary and theft from a jewelry store, and the appointed defense counsel regularly represented the victim and his jewelry store in civil matters. 40 Ill. 2d at 111-12. The court acknowledged that there was no showing that defense counsel's conduct was not resolute and diligent. The court reversed the conviction, however, because the Sixth Amendment right to counsel was too fundamental to allow representation of the accused by an attorney with a possible conflict of interest. The court relied on language in this Court's opinion in *Glasser* v. *United States,* 315 U.S. 60 (1942), for the principle that "[i]n a case involving such a conflict there is no necessity for a defendant to show actual prejudice." *Id.* at 113.

The attorney conflict of interest in *Glasser* arose from the fact that two defendants were represented jointly at trial by one attorney at the trial court's firm request, despite the attorney's express reluctance and over Glasser's voiced objection. 315 U.S. at 68-70. This Court found that in at least two instances the attorney's representation of Glasser was adversely affected by the joint representation and noted that the prosecution's case was circumstantial and slim. *Id.* at 77. This Court held that a conflict of interest violates a defendant's Sixth Amendment right to counsel if he is prejudiced, but that it is unnecessary for the reviewing court to determine "the precise degree of prejudice" suffered, and that courts will not "indulge in nice calculations as to the amount of prejudice arising from" the constitutional violation. *Id.* at 76-77.

While *Glasser* was factually a multiple representation conflict case, the early Illinois Supreme Court *per se* opinions were not, and the opinions did not distinguish between the two types of conflicts of interest. *Stoval, supra; People* v. *Meyers,* 46 Ill. 2d 149, 263 N.E.2d 81 (1970); *People* v. *Kester,* 66 Ill. 2d 162, 361 N.E.2d 569 (1977); *People* v. *Coslet,* 67 Ill. 2d 127, 364 N.E.2d 67 (1977). But in two cases when the Illinois Supreme court considered an alleged joint representation conflict in connection with the *per se* rule, it found that this Court in *Holloway* v. *Arkansas,* 435 U.S. 475 (1978), had held that possible conflicts in multiple representation were not *per se* violative of the Sixth Amendment. *People* v. *Berland,* 74 Ill. 2d 286, 300, 385 N.E.2d 649 (1978); *People* v. *Vriner,* 74 Ill. 2d 329, 340, 385 N.E.2d 671 (1978). The court did not, however, respond by modifying the *per se* rule, as it might have considering the fact that the *per se* rule derived from a multiple representation case. Instead, the court required a showing of "actual conflict manifest at trial" for multiple representation cases, and continued the

per se rule for the balance of the conflict cases. *People* v. *Nelson*, 82 Ill. 2d 67, 72-75, 411 N.E.2d 261 (1980); *People* v. *Washington*, *supra*, 101 Ill. 2d at 112.

This Court's analysis in *Cuyler* v. *Sullivan*, however, should have eliminated the Illinois court's reliance on *Glasser* v. *United States* for the maintenance of the *per se* rule. In *Cuyler* the defendant, Sullivan, and his two co-defendants were represented by two privately retained attorneys at separate trials. Sullivan's trial was first and he was convicted. 446 U.S. at 337-39. On a habeas corpus petition to the federal court, the defendant raised a conflict of interest claim. The Third Circuit Court of Appeals reversed defendant's conviction, finding that he made a showing of possible conflict of interest, and rejected an actual conflict standard. *Id.* at 340. This Court rejected the Third Circuit's "possible conflict" standard and remanded the case for consideration under the proper standard, which this Court thus defined. "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 348. In requiring a showing of actual conflict and adverse performance, *Cuyler* relied on the fact that the *Glasser* court found an actual conflict of interest and two resulting instances of adverse performance. Thus, *Cuyler* interpreted *Glasser* to a result inconsistent with the interpretation by the Illinois Supreme Court. *Id.* at 350.

Any question that *Cuyler* provides the definitive standard of review in all ineffective assistance of counsel claims due to attorney conflicts of interest is resolved by the analysis of this Court, quoted above, in *Strickland* v. *Washington*, *supra*. This Court is the final authority

on defendants' rights under the United States Constitution and the Illinois Supreme Court has incorrectly interpreted the Sixth Amendment which affects those rights. *Accord*, *Oregon* v. *Hass*, 420 U.S. 714, 719 (1975); *See also*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-62 (1981); *North Carolina*, v. *Butler*, 441 U.S. 368, 376 (1979).

The petitioner asks this Honorable Court to grant this petition and issue a Writ of *Certiorari* to review the decision of the Illinois Supreme Court. The misinterpretation of the Sixth Amendment, and the extra-constitutional application of the *per se* rule, by the Illinois courts will result in continuing injustice if it is not clarified and corrected by this Court. Petitioner requests that this Honorable Court grant this Petition for a Writ of *Certiorari*, and vacate the judgment of the Illinois Supreme Court and affirm respondent's murder conviction.

CONCLUSION

For the foregoing reasons, the People of the State of Illinois respectfully pray that a Writ of *Certiorari* issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX A

Docket No. 57925—Agenda 11—September 1983.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. CHARLES WASHINGTON, Appellee.

JUSTICE WARD delivered the opinion of the court:

Charles Washington was convicted by a jury in the circuit court of Cook County of the murder of Nathan Bottley (Ill. Rev. Stat. 1979, ch. 38, par. 9-1) and was given a sentence of 28 years. The appellate court (111 Ill. App. 3d 711) reversed, holding that the defendant was denied effective assistance of counsel. The court ordered a new hearing on the defendant's pretrial motions and a new trial. We granted the State's petition for leave to appeal under Rule 315 (87 Ill. 2d R. 315).

In November 1977, Albert Johnson was shot to death in Chicago Heights. The defendant, a Chicago Heights resident, was a suspect in that shooting, but was not arrested. On May 7, 1979, Nathan Bottley, the brother-in-law of the defendant, was shot and killed in a truck garage in Chicago. Chicago police, acting on information that the defendant had previously threatened Bottley and on two eyewitness accounts of the murder, made inquiries of Chicago Heights police regarding the defendant. Chicago Heights police officers re-interviewed witnesses to the November 1977 murder of Albert Johnson and on May 16, 1979, on the basis of the information gained from the reinterviews, a Chicago Heights officer arrested the defendant for the murder of Albert Johnson. The prosecution for the murder of Johnson was pending at the time of the conviction from which the appeal here was taken.

The defendant was first taken to the Chicago Heights police station and questioned about the Johnson and Bottley murders. Thereafter, the defendant was taken to Chicago and placed in a lineup where two eyewitnesses

identified him as the man who shot Nathan Bottley. The defendant was charged with the Chicago murder and then returned to the Chicago Heights police station. The grand jury later returned an indictment against the defendant for the murder of Nathan Bottley.

The defendant filed pretrial motions, claiming his arrest in Chicago Heights was without probable cause and that the lineup identifications should be suppressed. A consolidated pretrial hearing was held on the motions. The defendant was represented at the hearing on pretrial motions he filed and at trial by an attorney, Thomas Helsel, who served as the city attorney for Chicago Heights on a part-time basis. At the hearing, the assistant State's Attorney brought the defense attorney's other employment to the attention of the trial court. There was this colloquy in the defendant's presence:

"ASSISTANT STATE'S ATTORNEY: Judge, also I would like to put something in the record right now. I have discussed it with counsel before.

I would like the Court to be aware of, and let the record be perfectly clear that Mr. Helsel, who represents the defendant in this matter, is the City Attorney for the City of Chicago Heights.

THE COURT: I know that.

ASSISTANT STATE'S ATTORNEY: I want it on the record, to make sure there was no conflict in the future, and that this matter of course, of the allegation that it happened in the City of Chicago, and not in Chicago Heights, I want the record to be clear that he is the prosecutor for the City of Chicago Heights.

DEFENSE ATTORNEY: Judge, if Counsel would like it a matter of record, I can go one step further. I made my client aware of this situation before I even undertook to represent him in this matter. The point came up after I had been retained to represent him. At that point in time, I interviewed him and advised him that I could no longer represent him on

the Chicago Heights matter. I indicated if he desired for me to continue to represent him on the Chicago matter, that I anticipated no Chicago Heights Police Officers to be called. I feel I could, which he indicated he had no objection. Since that, I have withdrawn from the Chicago Heights matter.

ASSISTANT STATE'S ATTORNEY: Fine, Judge, so it is perfectly clear.

THE COURT: Mr. Washington, you have no objection to Counsel representing you in this matter?

THE DEFENDANT: No, Judge."

At the hearing, the State called a Chicago Heights police officer to establish that there was probable cause for the defendant's arrest in Chicago Heights on the Johnson charge. The defendant's attorney cross-examined this officer and then called another Chicago Heights officer as a rebuttal witness. The court, in denying defendant's motions, held that there was probable cause for the arrest on the Chicago Heights murder, based principally on the testimony of the two Chicago Heights police officers. The court also rejected defense complaints of the lineup identification of the defendant at the Chicago police station, holding that the defendant had remained in the custody of the Chicago Heights police until a warrant was issued in the Bottley prosecution. The defendant was found guilty of the murder of Bottley.

On appeal the appellate court upheld the defendant's contention that he was denied effective assistance of counsel because of his attorney's conflict of interest. The defendant contended that his attorney, serving as a Chicago Heights prosecutor, was forced to represent inconsistent interests, since the legality of the defendant's arrest and identification rested upon the testimony of Chicago Heights police officers. In reversing, the appellate court stated that "[s]ince the nature and duties of a public prosecutorial position are inherently incompatible with those of criminal defense when the employer-munic-

ipality is involved in the case in any significant way, we conclude that defendant was denied effective assistance of counsel here." 111 Ill. App. 3d 711, 716.

An accused's sixth amendment right to effective assistance of counsel is a fundamental right. (*Cuyler* v. *Sullivan* (1980), 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708; *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457.) The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations. (*People* v. *Franklin* (1979), 75 Ill. 2d 173; *People* v. *Kester* (1977), 66 Ill. 2d 162; *People* v. *Stoval* (1968), 40 Ill. 2d 109.) In order to assure and protect these rights, the defendant need not show prejudice in order to justify a reversal of his conviction if the attorney representing him has an actual or possible conflict of professional interests. *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *People* v. *Robinson* (1979), 79 Ill. 2d 147; *People* v. *Fife* (1979), 76 Ill. 2d 418; *People* v. *Coslet* (1977), 67 Ill. 2d 127; *People* v. *Stoval* (1968), 40 Ill. 2d 109.

In *People* v. *Stoval* (1968), 40 Ill. 2d 109, the defendant's court-appointed counsel was a member of a law firm that had represented both the corporation that owned the jewelry store which the defendant was accused of burglarizing and the individual who operated the store. The attorney had also individually represented the corporation and the store's operator, before the law firm's representation of them. In reversing the defendant's conviction, this court held that sound policy prohibited representation by an attorney with the possible conflict of interests that was shown. The court was concerned by the subliminal effects of the conflict on counsel and, citing *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457, stated that in such a case "there is no necessity for the defendant to show actual

prejudice." (*People* v. *Stoval* (1968), 40 Ill. 2d 109, 113.) *Stoval* was referred to as establishing a *per se* rule in *People* v. *Coslet* (1977), 67 Ill. 2d 127.

In *Coslet*, the defendant, who was accused of murdering her husband, was represented by counsel who also represented the administrator of the husband's estate. The attorney had a duty to preserve the assets of the estate and a duty as well to represent the interest of the wife in the prosecution. The conviction of the wife would have benefited the estate, since the wife by statute would not be accorded the rights of a surviving joint tenant. This court, saying it was applying the *Stoval per se* rule, held that this possibility, that the defendant's conviction might enrich her husband's estate, required reversal of the defendant's conviction of voluntary manslaughter. The application of the *per se* rule is illustrated too in *People* v. *Kester* (1977), 66 Ill. 2d 162. There, a court-appointed assistant public defender, who represented the defendant at the time his guilty pleas were accepted, had appeared earlier on three occasions in the same criminal proceeding as an assistant State's Attorney. Observing that defense counsel's former association could influence his conduct by a "subconscious desire to avoid an adversary confrontation with the prosecution," this court reversed the conviction on the "possibility that the attorney might be subject to subtle influences which could be viewed as adversely affecting his ability to defend his client in an independent and vigorous manner." 66 Ill. 2d 162, 167.

The State contends that we should not apply our *per se* rule on attorney conflicts of interest in light of *Cuyler* v. *Sullivan* (1980), 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 where the Supreme Court stated:

> "[T]he multiple representation in this case involved a possible conflict of interest. We hold that the possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of

> his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." (446 U.S. 335, 350, 64 L. Ed. 2d 333, 348, 100 S. Ct. 1708, 1719.)

The State, in urging us not to apply the so-called *per se* test, but to adopt the "actual conflict" test in *Cuyler* overlooks the fact that *Cuyler* involved multiple representation of defendants. This court's holdings already make it clear that where a defendant alleges ineffective assistance of counsel due to conflicts arising from joint representation of codefendants, the *per se* standard is not applicable. (*People* v. *Berland* (1978), 74 Ill. 2d 286, 304; *People* v. *Echols* (1978), 74 Ill. 2d 319.) In cases where codefendants are jointly represented by one attorney, a defendant must demonstrate "an actual conflict of interest manifested at trial" in order to claim a denial of effective assistance of counsel. (*People* v. *Nelson* (1980), 82 Ill. 2d 67; *People* v. *Robinson* (1979), 79 Ill. 2d 147; *People* v. *Vriner* (1978), 74 Ill. 2d 329, 341.) When an actual conflict has been shown, it is unnecessary to demonstrate prejudice in order to sustain a claim of violation of the right to the assistance of counsel. (*Holloway* v. *Arkansas* (1978), 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173; *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *People* v. *Stoval* (1968), 40 Ill. 2d 109.) The approach in joint representation cases is different from the *per se* rule because, as was recognized in *Cuyler*, "a possible conflict inheres in almost every instance of multiple representation." 446 U.S. 335, 348, 64 L. Ed. 2d 333, 346, 100 S. Ct. 1708, 1718.

Turning to the facts here, we agree that the defendant was denied effective assistance of counsel. The defendant's attorney had an obligation to vigorously defend the accused, which included here the simultaneous obligation to oppose and to attempt to discredit a police officer and representative of the municipality he was serving as its prosecutor.

The appellate court described the dilemma: "[W]hen a city prosecutor acts as defense counsel in a case where his own city police officers are involved, a struggle inevitably arises between counsel's obligation to represent his client competently and zealously, and 'a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities.'" (111 Ill. App. 3d 711, 715, quoting from *People* v. *Rhodes* (1974), 12 Cal. 3d 180, 184, 524 P.2d 363, 366, 1115 Cal. Rptr. 235, 238.) Here, contrary to the attorney's expectation, a Chicago Heights police officer was called as a witness for the prosecution. The attorney was obliged to cross-examine and attempt to discredit one of the officers whose veracity and credibility he vouched for when acting as a prosecutor for his municipality. Certainly the possibility was raised that the attorney's duty of undivided loyalty to the accused was affected by contradicting obligations.

The defendant in *People* v. *Fife* (1979), 76 Ill. 2d 418, was convicted of unlawful delivery of cannabis. The defendant was represented by an attorney who was also a special assistant Attorney General handling unemployment compensation cases for the State on a part-time basis. The defendant conceded that his counsel was diligent in his defense, but he argued he was denied effective assistance due to his counsel's possible conflict of interest. This court applied the *per se* rule in reversing the conviction due to "the possible, perhaps subliminal pressure a defense counsel who is also a special assistant for workmen's compensation cases might receive from the Attorney General's office." (76 Ill. 2d 418, 424-25.) The concern here, too, is the subtle and subsconscious pressure the suggested conflict may have had on counsel.

The State argues that, even if a conflict of interest did exist, the colloquy in the courtroom, quoted above, shows

that there was a knowing and voluntary waiver by the defendant of the right to the assistance of counsel free from any possible conflict of interest. It is, of course, true that the right to effective assistance of counsel assured by the sixth amendment is subject to being waived by an accused. (*Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457; *People* v. *Robinson* (1979), 79 Ill. 2d 147, citing *United States* v. *Alvarez* (5th Cir. 1978), 580 F.2d 1251; *People* v. *Fredrich* (1960), 20 Ill. 2d 240.) A court, however, will indulge in every reasonable presumption against waiver of a constitutional right. (*Brewer* v. *Williams* (1977), 430 U.S. 387, 404, 51 L. Ed. 2d 424, 440, 97 S. Ct. 1232, 1242; *People* v. *Fife* (1979), 76 Ill. 2d 418, 423.) In order to ascertain if there has been an intelligent waiver of the right to the assistance of counsel, one should look to the circumstances surrounding the claimed waiver and consider the background, experience and conduct of the accused. *Johnson* v. *Zerbst* (1938), 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019.

We judge that here there was not a knowing and understanding waiver by the defendant. The defense attorney's statement to the trial judge showed his awareness of a possible conflict of interest if officers of the Chicago Heights police department were to appear as witnesses. The record does not show any explanation to the defendant at the time of his statement of willingness to have the attorney serve as his counsel, or later, when the Chicago Heights police officers were called as witnesses, why there could be a conflict of interest and how it might affect his representation by the attorney. Further, there is nothing to show that, because of his education and background, the defendant understood the nature of an attorney's conflict of interest and its possible effect upon the representation of a client. The State's response to this is that no explanation of the conflict here had to be given the defendant because the possibility of conflict was apparent and must have been understood by the defendant. The response does

not satisfy. We consider that the question here involving possible subliminal effects upon representation of a client's interest and of waiver was not plain and simple. In fact, the questions typically are not simple, and explaining adequately the effect of a conflict to the one represented may present severe difficulties. This was illustrated in *People* v. *Meyers* (1970), 46 Ill. 2d 149, 152: "[I]t is difficult, if not impossible, to satisfactorily advise a defendant of the subtle effect which a conflict of interests may have upon *** counsel's representation."

For the reasons given, the judgment of the appellate court is affirmed.

Judgment affirmed.

APPENDIX B

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

CHARLES WASHINGTON,
Defendant-Appellant.

First District (3rd Division) No. 80-2567

Reversed and remanded.

Opinion filed December 30, 1982.

Appeal from the Circuit Court of Cook County; the Hon. Lawrence Genesen, Judge, presiding.

Robert K. Mayer, of Chicago for appellant.

Richard M. Daley, State's Attorney, of Chicago (Michael E. Shabat, Joan S. Cherry, David A. Shapiro, and Harry John Devereux, Assistant State's Attorneys, of counsel), for the People.

JUSTICE RIZZI delivered the opinion of the court:

A jury found defendant, Charles Washington, guilty of murder and armed violence. (Ill. Rev. Stat. 1977, ch. 38, pars. 9—1, 33A—2.) The armed-violence conviction was dismissed, and defendant received a 28-year sentence for murder. Defendant contends that he was denied effective assistance of counsel due to his counsel's conflict of interest in simultaneously serving as city prosecutor for Chicago Heights, a municipality with considerable connection to the Chicago offense for which defendant was prosecuted. Defendant also contends that the State failed to prove him guilty beyond a reasonable doubt. We reverse and remand.

On May 16, 1979, a Chicago Heights police officer, accompanied by two Chicago police officers, arrested defendant without a warrant for a murder which had occurred one and a half years earlier in Chicago Heights. Later that day, defendant was turned over to Chicago police officers, who put him in a lineup where two eyewitnesses identified him as the man who shot and killed Nathan Bottley in Chicago on May 7, 1979. Prior to the Bottley murder trial, defendant moved to quash his arrest and suppress the identifications. During the consolidated hearing on those motions, the assistant State's Attorney informed the court that defense counsel was the city attorney for Chicago Heights. Defense counsel then stated that he told defendant that he could no longer represent him in the Chicago Heights case and that if defendant still wanted to be represented by him in the Chicago case, he anticipated that no Chicago Heights police officers would be called. The trial court then, without explaining to defendant the potential conflict, elicited defendant's assent to the representation. Later in the hearing, the State called a Chicago Heights police officer whom defense counsel cross-examined. Subsequently, defense counsel himself called a different Chicago Heights police officer. At the conclusion of the hearing, the trial court found that the police had probable cause to arrest defendant for the Chicago Heights offense and that defendant was not in custody on the Chicago charge until a warrant issued against him. The trial court then denied both defense motions. The case proceeded to trial, and a jury found defendant guilty of murder and armed violence.

• 1 Defendant contends that he was denied effective assistance of counsel as a result of his counsel's conflict of interest. Initially, the State maintains that defendant waived appellate review of his trial counsel's conflict of interest because he failed to raise the issue at trial or in his post-trial motion for a new trial. We disagree. The conflict here was clearly brought to the attention of the trial court. Moreover, absent post-trial review by an independent attorney, appellate review of a defense counsel's conflict of interest is not waived by the failure to

raise the issue in a post-trial motion. (See *People* v. *Hunt* (1979), 73 Ill. App. 3d 1034, 1037, 392 N.E.2d 793, 795; *People* v. *Mathes* (1979), 69 Ill. App. 3d 275, 282, 387 N.E.2d 39, 43-44.) In this case, independent counsel first appeared weeks after defendant's motion for a new trial and motion in arrest of judgment had been filed, argued and denied. (See *People* v. *Arreguin* (1981), 92 Ill. App. 3d 899, 901, 416 N.E.2d 402, 403.) We will therefore consider the merits of defendant's argument.

The sixth amendment right to counsel includes a correlative right to representation free from conflicts of interest. (*People* v. *Lewis* (1981), 88 Ill. 2d 429, 436, 430 N.E.2d 994, 998, citing *Wood* v. *Georgia* (1981), 450 U.S. 261, 67 L. Ed. 2d 220, 101 S. Ct. 1097; *Cuyler* v. *Sullivan* (1980), 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708; *Holloway* v. *Arkansas* (1978), 435 U.S. 475, 55 L. Ed. 2d 426, 98 S. Ct. 1173; *Glasser* v. *United States* (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457.) A defendant is entitled to the undivided loyalty of his attorney. (*People* v. *Stoval* (1968), 40 Ill. 2d 109, 111, 239 N.E.2d 441, 443, citing *Glasser* v. *United* States (1942), 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457.) Thus, defense counsel should not represent conflicting interests or undertake the discharge of inconsistent obligations. (*People* v. *Kester* (1977), 66 Ill. 2d 162, 166, 361 N.E.2d 569, 571.) The Illinois Supreme Court has fashioned a *per se* rule under which prejudice is presumed and reversal is mandated where defense counsel is shown to have had conflicting professional commitments.[1] (*People* v. *Stoval* (1968), 40

[1] The Illinois Supreme Court has determined that the *per se* rule does not apply where a defendant alleges ineffective assistance of counsel due to joint representation in those situations, a defendant must show "an actual conflict of interest manifested at trial." (*People* v. *Berland* (1978), 74 Ill. 2d 286, 299-300, 385 N.E.2d 649, 655.) Thus, Illinois law does not diverge, as the State suggests, from that set forth in *Cuyler* v. *Sullivan* (1980), 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708, a case involving multiple representation.

Ill. 2d 109, N.E.2d 441; see *People* v. *Fife* (1979), 76 Ill. 2d 418, 392 N.E.2d 1345; *People* v. *Coslet* (1977), 67 Ill. 2d 127, 364 N.E.2d 67; *People* v. *Kester* (1977), 66 Ill. 2d 162, 361 N.E.2d 569; *People* v. *Meyers* (1970), 46 Ill. 2d 149, 263 N.E.2d 81.) Professional commitments have been found to conflict where defense counsel simultaneously served as a special assistant Attorney General, even though her duties were specific and noncriminal (*People* v. *Fife* (1979), 76 Ill. 2d 418, 392 N.E.2d 1345), and where defense counsel previously appeared for the State in the same case (*People* v. *Kester* (1977), 66 Ill. 2d 162, 361 N.E.2d 569). In the case before us, defense counsel served part-time as city prosecutor for Chicago Heights. We believe that counsel's professional commitments inevitably conflict when such inherently inconsistent roles are undertaken and the employer-municipality is involved in the case in any significant way. Here, defense counsel's employer, the city of Chicago Heights, was significantly involved since the legality of defendant's arrest and identification depended to some extent upon the activities of Chicago Heights police officers.

The State contends, however, that no conflict arose in this case because defense counsel's prosecutorial authority did not extend to any State charges or to any case outside Chicago Heights. In support of its position, the State relies on *People* v. *Satterwhite* (1967), 38 Ill. 2d 138, 230 N.E.2d 206, and *People* v. *Garrett* (1978), 57 Ill. App. 3d 906, 373 N.E.2d 792. We believe both cases are distinguishable. In *Satterwhite,* which was decided before the formulation of the *per se* rule, the defendant merely asserted in a post-conviction petition that his defense counsel was also an assistant corporation counsel for the city of Chicago. In *Garrett,* the defense counsel simultaneously served as mayor of a city that was not significantly involved in the case, and he only represented the defendant with regard to the motion to withdraw his guilty plea, not the plea itself.

• 2 Although we acknowledge the limited scope of defense counsel's prosecutorial duties, we believe that the critical question concerns the scope of his professional commitments, an inquiry which demands consideration of the realities of his practice and the ethical responsibilities of his position. We note, as have other courts, that when a city attorney prosecutes violations of city ordinances, city police officers are the primary, if not sole, prosecution witnesses. (See, *e.g., People* v. *Rhodes* (1974), 12 Cal. 3d 180, 183-84, 524 P.2d 363, 365, 115 Cal. Rptr. 235, 237; *Karlin* v. *State* (1970), 47 Wis. 2d 452, 458-59, 177 N.W.2d 318, 321-22.) Therefore when a city prosecutor acts as defense counsel in a case where his own city police officers are involved, a struggle inevitably arises between counsel's obligation to represent his client competently and zealously, and "a public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities." (*People* v. *Rhodes* (1974), 12 Cal. 3d 180, 184, 524 P.2d 363, 366, 115 Cal. Rptr. 235, 238.) This type of conflict operates to deprive a defendant of the undivided loyalty of his counsel. Moreover, "it places an additional burden on counsel, however conscientious, and exposes him unnecessarily to later charges that his representation was not completely faithful." (*People* v. *Stoval* (1968), 40 Ill. 2d 109, 113, 239 N.E.2d 441, 444.) In addition, a public prosecutor's vigorous representation of a criminal defendant may interfere with essential interdependent and supportive relationships among law enforcement agencies, thereby endangering the proper functioning of the criminal justice system. (See *People* v. *Rhodes* (1974), 12 Cal. 3d 180, 184, 524 P.2d 363, 366, 115 Cal. Rptr. 235, 238.) Finally, public confidence in the integrity and impartiality of the criminal justice system demands that public officials avoid even the appearance of impropriety. This demand echoes an attorney's personal professional responsibility. (Ill. Rev. Stat. 1981, ch. 110A, Canon 9.) Since the nature and duties of a public prosecutorial position are inherently incompatible with those of criminal defense when the employer-municipality is involved in the case in any significant way, we conclude that defendant was denied effective assistance of counsel here.

The State further argues that even if defense counsel had a conflict of interest in this case, defendant effectively waived his sixth amendment right to conflict-free representation. We disagree. We must apply every reasonable presumption against waiver of fundamental constitutional rights, and, in determining whether the right to counsel free from any conflict of interest has been knowingly and intelligently waived, we must look to the circumstances of the particular case, including the background, experience and conduct of the defendant. See *Johnson* v. *Zerbst* (1937), 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 1023.

Here, defense counsel apparently recognized that his prosecutorial position with Chicago Heights created a conflict which precluded him from representing defendant in the Chicago Heights case, for he advised defendant that he could no longer represent him in that case and withdrew from it. Apparently, defense counsel believed he could represent defendant in the Chicago case, but in offering his continued representation to defendant, he told defendant that he did not expect any Chicago Heights police officers to be called. Early in the hearing on defendant's motions to quash arrest and to suppress identifications, before Chicago Heights police officers were called, the trial court considered defendant's assent to representation by the part-time prosecutor for Chicago Heights. However, the court neither probed defendant's understanding of the conflict nor tested the knowledgeability of defendant's assent. Rather, the court asked, "[Y]ou have no objection to counsel representing you on this matter?" Defendant responded, "No, judge." Later, when Chicago Heights police officers were called to testify, neither defense counsel nor the trial court questioned

defendant to determine whether he wanted to withdraw his assent.

• 3, 4 Since an important potential source of conflict here was the "subconsciously compromising effect" which counsel's prosecutorial position might have had on defendant's defense (See *People* v. *Meyers* (1970), 46 Ill. 2d 149, 152, 263 N.E.2d 81, 83), this is clearly not a case where defendant did not require an explanation by the trial court or by counsel to alert him to the potential conflict (see *People* v. *Lewis* (1981), 88 Ill. 2d 429, 437, 430 N.E.2d 994, 998). Furthermore, the record does not suggest that defendant had any experience with the legal system which would add to his ability to appreciate the relationships of parties and the possibility of conflicting interests (see *People* v. *Stroner* (1982), 104 Ill. App. 3d 1, 7, 432 N.E.2d 348, 352). Given the nature of the conflict, the lack of explanation, and the background of defendant, we conclude that defendant never knowledgeably assented to representation by counsel with a conflict of interest and did not knowingly and intelligently waive his sixth amendment right to conflict-free representation. Since defendant did not have conflict-free representation, we conclude that he is entitled to a new hearing on his pretrial motions and a new trial.

In view of our decision that defendant should be given a new hearing on his pretrial motions and a new trial, the only other issue we need to address is whether defendant was proved guilty beyond a reasonable doubt. Defendant argues that the reliability of his identification is doubtful. Defendant called several witnesses who either placed him elsewhere at the time of the occurrence or could not identify him as the perpetrator of the crime. There were, however, two witnesses who had an opportunity to view the perpetrator, and they positively identified defendant. We therefore believe that the evidence was sufficient for a jury to conclude that defendant was guilty beyond a reasonable doubt. This does not mean that we

are making a finding as to defendant's guilt or innocence which would be binding on retrial, but rather, our consideration of the sufficiency of the evidence protects defendant's constitutional right against double jeopardy as mandated by *People* v. *Taylor* (1979), 76 Ill. 2d 289, 309, 391 N.E.2d 366, 375. See *People* v. *Clark* (1980), 84 Ill. App. 3d 637, 642, 405 N.E.2d 1192, 1195-96.

Accordingly, the judgment is reversed, and the case is remanded for a new hearing on defendant's pretrial motions and a new trial.

Reversed and remanded.

WHITE, P.J., and McGILLICUDDY, J., concur.

RESPONDENT'S

BRIEF

Office Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1971

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,
vs.
CHARLES WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

RESPONDENT'S MEMORANDUM IN OPPOSITION

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October 1984

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RESPONDENT'S MEMORANDUM IN OPPOSITION

Petitioner contends that a criminal defendant receives a fair trial, and the effective assistance of counsel, even though defense counsel simultaneously serves as city prosecutor for the municipality whose police officers are key prosecution witnesses.

The relevant facts of this case include the following: Charles Washington was charged with

two separate murders. One occurred in Chicago Heights and the other occurred in Chicago. Washington hired a lawyer who was also the city prosecutor for Chicago Heights. Defense counsel withdrew from the Chicago Heights case, acknowledging the obvious conflict. He did not however, withdraw from the Chicago case, stating in open court that he felt that there was no conflict, and that no Chicago Heights police officers would testify. Later, during the course of a hearing on the pretrial motion to suppress line-up identifications, two Chicago Heights police officers were, in fact, called to testify, and defense counsel was required to attempt to cross-examine and impeach them. The prosecutor argued that probable cause existed to arrest Washington on the Chicago Heights case, and therefore the line-up identifications were admissable. Defense counsel argued that no probable cause existed to arrest Washington, and attempted to argue that the arrest for the Chicago Heights homicide was a sham and pretexual.

The trial court found probable cause for the Chicago Heights arrest only, and denied the motion to suppress. In spite of defense counsel's statements regarding the non-involvement of Chicago Heights in the middle of the hearing (Pet. 4 & 5), the trial court failed to inquire into the conflict of interest when the Chicago Heights police officers were thereafter called. Washington was found guilty of murder by a jury.

1. Both the Illinois Appellate and Supreme Courts recognized that the above related facts created an actual, substantial conflict of interest which, by its very nature, affected counsel's performance. One can hardly imagine a conflict of greater magnitude. As stated by the Illinois Supreme Court:

> The defendant's attorney had an obligation to vigorously defend the accused, which included here the simultaneous obligation to oppose and attempt to discredit a police officer and representative of the municipality he was serving as prosecutor.
>
> The appellate court described the dilemma: "(W)hen a city prosecutor acts as defense counsel in a case where his own city police officers are involved, a struggle inevitably arises between counsel's obligation to represent his client competently and zealously, and a 'public prosecutor's natural inclination not to anger the very individuals whose assistance he relies upon in carrying out his prosecutorial responsibilities.' (citations ommitted) (Pet. 6a & 7a)

2. Petitioner misplaces reliance on this Court's decision in Cuyler v. Sullivan, 446 U.S. 335 (1980). In Cuyler, the lower courts had found only a possibility of a conflict of interest on the part of defense counsel, and there had been no determination that it affected his performance in any way. In the present case, however, the record reveals an obvious conflict of interest which, by its very nature, affects counsel's performance. It is axiomatic that an attorney cannot represent both parties in a contested litigation effectively. No attorney is capable of denying and forgetting his duties and obligations to one client, while simultaneously representing an opposing party. Nor does our system of justice permit it. See, e.g., the Code of Professional Responsibility,, Sections EC5-1 (Personal interest adversely affects client); EC5-15(multiple clients; impairment of loyalty); EC5-16 (multiple clients; duty to inform client of implications); EC5-17 (multiple clients); EC5-21 (attorney subject to outside pressures; social political); EC7-8 (duty to inform client); EC7-9 (duty to act in client's best interest); DR5-101 (lawyer shall not fail to seek lawful objectives of client, or prejudice client); DR5-105 (third

party influence on representation of client).

3. Although the trial court, below, became aware of the obvious conflict of interest mid-way through the hearing on the motion to suppress, he failed to make an inquiry, and reversal is therefore mandated. As noted by this Court, "nothing in (Cuyler v. Sullivan, supra) rules out the raising of a conflict-of-interest problem that is apparent on the record. Moreover, Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.' "(citation ommitted) Wood v. Georgia, 450 U.S. 261, 272 fn. 18. When, contrary to defense counsel prior assertion, Chicago Heights police officers testified against the defendant, and the prosecutor then argued that the admissability of evidence was predicated upon probable cause for the Chicago Heights homicide, the trial knew that an actual conflict of interest was present, and his failure to inquire into it mandates reversal.

4. Although the Illinois Supreme Court expressly relied upon federal court decisions in fashioning its per se rule (which, we submit, was mere dicta, in its decision below), it is clear that its application is the result of that Court's

policy, with respect to the control of the lower court's dockets. The Illinois Supreme Court has determined that the application of this rule is necessary to preserve the integrity of the state trial courts. This Court should not interfere with that determination, which is predicated by independant state policy.

Petitioner has pointed to no case where any court has ruled that a prosecutor may simultaneously represent a criminal defendant, attempt to cross-examine and impeach the very police officers upon whose veracity he routinely vouches for, and then argue that their testimony is false. Indeed, there is none. This type of conflict is so obvious, so serious, that a fair trial would be impossible to attain, and the effective assistance of counsel is denied.

CONCLUSION

For the above and foregoing reasons, the Respondent respectfully prays that this Court deny Petitioner's request for the issuance of a Writ of Certiorari, thereby permitting the Respondent to receive a fair trial, and the effective assistance of counsel in the State court.

Respectfully Submitted,

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OPINION

(3)

SUPREME COURT OF THE UNITED STATES

ILLINOIS v. CHARLES WASHINGTON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 83-1971. Decided November 13, 1984

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting.

In *Cuyler* v. *Sullivan*, 446 U. S. 335 (1980), this Court held that in order to establish a Sixth Amendment violation, a defendant challenging his attorney's representation of multiple clients must establish that the attorney's performance was affected by an actual conflict of interest, not merely a potential one. In the present case, the Illinois Supreme Court held that *Cuyler*'s actual-conflict-of-interest standard was limited to multiple-representation situations. Because that holding is contrary to the results reached by at least six other courts, I dissent from the denial of certiorari.

On May 7, 1979, Nathan Bottley was murdered in Chicago. Chicago police suspected Charles Washington, a resident of Chicago Heights, and made inquiries to the Chicago Heights police. As a result of these inquiries, Chicago Heights police officers re-interviewed witnesses to a 1977 murder in Chicago Heights, in which Washington had been a suspect, and arrested Washington for that crime. While Washington was in custody, he was also charged by Chicago police for the Bottley murder.

After being indicted for the Bottley murder, Washington filed pre-trial motions to quash arrest and suppress identification, contending that his arrest in Chicago Heights had been without probable cause. Washington's attorney at this hearing also served as the city attorney for Chicago Heights, a fact that the state's attorney brought to the attention of the

trial court. The defense attorney responded that he had consulted with Washington about the possible conflict of interest inherent in this situation, but that he "anticipated no Chicago Heights Police Officers to be called" in connection with the Chicago murder. The court questioned Washington and ascertained that he had no objection to being represented by his defense counsel.

Contrary to defense counsel's expectation, the state called a Chicago Heights police officer to establish that there was probable cause for the defendant's arrest in Chicago Heights on the 1977 murder charge. Defense counsel cross-examined the officer and then called another Chicago Heights officer as a rebuttal witness. The trial court denied Washington's motion to quash arrest, basing its holding primarily on the testimony of these two officers.

On appeal, Washington argued that he was denied effective assistance of counsel because of his attorney's conflicting interests. The Illinois appellate court reversed the conviction on this ground, and the Illinois Supreme Court agreed. The Illinois Supreme Court adhered to its long-standing view that as a matter of federal constitutional law even a potential conflict of interest required reversal, rejecting the state's contention that *Cuyler* v. *Sullivan* required Washington to show that his attorney's performance had been adversely affected by an actual conflict of interest. The state's argument, the Court held, overlooked the fact that *Cuyler* involved multiple representation of defendants. The Court focused on *Cuyler*'s observation that "a possible conflict inheres in almost every instance of multiple representation," so that a presumption that even potential conflict resulted in ineffective assistance "would preclude multiple representation even in cases where '[a] common defense . . . gives strength against a common attack.'" 446 U. S., at 348, quoting *Glasser* v. *United States*, 315 U. S. 60, 92 (1942) (Frankfurter, J., dissenting).

Unlike the Illinois Supreme Court, numerous federal courts have failed to discern in *Cuyler* any limitation to cases involving multiple representation of defendants. *See Westbrook* v. *Zant*, 704 F. 2d 1487, 1498–1499 (CA11 1983); *United States* v. *Harris*, 701 F. 2d 1095, 1099 (CA4 1983); *United States* v. *Knight*, 680 F. 2d 470, 471 (CA6 1982) *(per curiam)*, *cert. denied*, 103 S. Ct. 723 (1983); *Ware* v. *King*, 694 F. 2d 89, 92 (CA5 1982) *(per curiam)*, *cert. denied*, 103 S. Ct. 2092 (1983); *Alexander* v. *Housewright*, 667 F. 2d 556, 558 (CA8 1981); *United States* v. *Hearst*, 638 F. 2d 1190, 1193 (CA9 1981). Most of these courts have simply applied *Cuyler* to non-multiple-representation situations without even considering the possibility that it did not apply. In *United States* v. *Hearst*, the Ninth Circuit observed that "Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interests," but concluded, without discussion, that this difference, among others, was "immaterial." 638 F. 2d, at 1193. In *Theodore* v. *New Hampshire*, 614 F. 2d 817 (CA1 1980), a pre-*Cuyler* case, the court held that an actual-conflict standard applied when a defendant's attorney had represented a principal prosecution witness in an earlier trial arising out of the same incident. The court noted that "[b]ecause this is a case involving dual representation, not joint representation, the danger of conflict is not as great, hence judicial scrutiny need not be as deep." 614 F. 2d, at 822. This at least suggests an approach directly opposite to that taken by the Illinois Supreme Court, which reasoned that *greater* judicial scrutiny was called for where defense counsel merely represented a prosecution witness.

Because the decision below creates a conflict among the lower courts on an important and frequently recurring question of constitutional law, I would grant the petition for certiorari.